

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-6022

CAUSE NO. 77-6022

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

by DOROTHY S. GREENBERG,

for herself as well as for the United States of America,

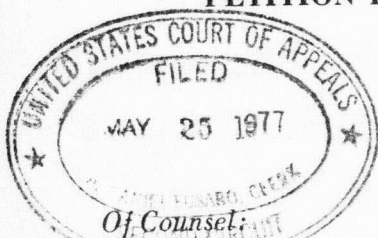
Plaintiff-Relator-Appellant,

vs.

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMITT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP,

Defendants-Appellees.

**APPELLANT DOROTHY S. GREENBERG'S
PETITION FOR REHEARING IN BANC**



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Defendants-Appellees.

**RELATOR-APPELLANT'S PETITION FOR
REHEARING IN BANC**

NOW COMES the Relator-Appellant, Dorothy S. Greenberg, for herself as well as for the United States of America, and files her Petition for Rehearing in Banc, and in connection

herewith submits that this action involves an alleged fraud upon the United States Government by a foreign corporation, which if true, amounts to illegal credit to a foreign corporation in an amount approximately three times that granted to the Lockheed Corporation. This action is to determine whether a foreign corporation can avail itself of U. S. financing, contrary to statutory prohibitions, by organizing dummy corporations in the United States.

Relator submits that this Honorable Court* has overlooked or misapprehended several significant questions, which questions are of such exceptional importance that they should be entertained by the Honorable United States Court of Appeals for the Second Circuit in Banc. The Relator-Appellant respectfully submits that this Court's affirmation of the District Court's Order of Dismissal for want of jurisdiction was erroneous for the following reasons:

POINT ONE

AT THE TIME THE RELATOR FILED HER SUIT, THE GOVERNMENT WAS NOT IN POSSESSION OF ALL OF THE ESSENTIAL INFORMATION.

The Government conceded in its brief that since late 1972 it has paid \$79 million for construction differential subsidies ("CDS"); that these payments have been made in connection with and under three applications filed on July 14, 1972, with

*By a panel consisting of only one judge, who is a member of this Court and not of senior status.

the United States Maritime Administration ("MarAd") (amended on August 31, September 15 and 20, 1972 [A 280-330]) and approved by MarAd on September 22, 1972; that the applications and payments are in connection with the construction of three LNG tankers being built by the Defendant-Appellee General Dynamics Corporation for the Defendant-Appellee Burmah Oil Tankers Limited ("BOT") and its parent company, Defendant-Appellee The Burmah Oil Company Limited ("Burmah"), to transport liquefied natural gas, not to or from the United States, but from Indonesia to Japan. [The Government's Brief re "the Cryogenic Applications" at pages 8-10 thereof.]

The Cryogenic Applications, in connection with the Easco transaction, is one of the two alleged fraudulent transactions challenged by the Relator's Complaint, on the ground that deliberately false citizenship affidavits were submitted to the government in support of the applications (Complaint ¶¶ 22, 24, 25, 29, 31 to 34 and 40 to 44). [A 11, et seq.] The underlying factual issue is whether Burmah, "by any . . . means whatsoever" controlled or was permitted to exercise control over the applicant for the CDS financing in the summer and fall of 1972, when the applications were filed and approved, [See Section 2(b)(d) of the Shipping Act of 1916 as amended, 46 U.S.C. §802 (b)(d). If it did, then the financing was not legally available under the Act.

In 1975, the White House apparently inquired as to the validity of these Cryogenic applications. Assistant Attorney General Leon Ulman, in his opinion of April 9, 1975 in response (A 481-488), obviously strained to justify their validity. He

cited no judicial precedent and he ignored Burmah's control:

It would appear that as to the particular transaction addressed herein the Secretary did assure himself that the operation and control of the vessels in question would remain the responsibility of the bareboat charterer, an American citizen as defined in the Shipping Act, 1916. Moreover he assured that the time charterer, the ultimate user, was a corporation organized under the laws of the United States, albeit not a citizen under the Shipping Act of 1916 (A 487).

Assistant Attorney General Ulman obviously did not have the benefit of Burmah's admissions of illegality, see the Kurrus Memorandum and the May 29, 1975 proposal (A 47-49; 553-574); nor did he have any of the other documents or information provided by Relator.

In response to a letter from Congressman Les Aspin (of Wisconsin) dated October 2, 1976, complaining of the Burmah matter (A 523-529), Secretary of Commerce Richardson responded at length on November 17, 1976 (A 530-536), and in part referred to the pendency of this action (filed some 48 days before), as follows:

As you may be aware, the forfeiture contention is currently the subject of civil litigation in federal district court in New York. *In this civil action, most of the documents which have been the basis for media reports,, such as the New York Times article of August 19, have been brought to light* and as a consequence, MarAd has recently been able to review these documents — *most of them for the first time*. Nothing in them, including the "legal memorandum" by Richard Kurrus, would lead MarAd to change its belief that the LNG vessels are not subject to forfeiture. (Emphasis Ours (A 533)).

Thus, Secretary Richardson conceded* that certain of Relator's documents had never before come to the attention of MarAd and at that as a consequence of Relator's action MarAd "has recently been able to review" them, and "*most of them for the first time.*" No where in the moving affidavit submitted by the Government is it even suggested that prior to September 30, 1976, the Government was aware of the alleged complicity of MarAd and that Administrator Blackwell of that agency

... recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full-fledged legal controversy between Burma and Energy. (Kurrus Memorandum, A 49).

In filing this action, Relator, through her counsel, compiled and organized information and evidence about an alleged fraud perpetrated on the United States and its taxpayers, only *some* of which information and evidence was in possession of the Government, scattered among various of its agencies. On September 30, 1976, neither the Department of Justice, the Securities and Exchange Commission, the General Accounting Office, nor any other investigative or prosecutorial agency of the executive branch of the Government had Relator's documents, except for the August 19, *New York Times* article. And even MarAd as a consequence of the bringing of this action, was able to review most of these documents for the first time. (A 533).

*Secretary Richardson's admission contradicts the sworn affidavit of Samuel B. Nemirow, General Counsel of MarAd. (A 274-277).

Not only was the Kurrus Memorandum provided by Relator, not in the possession of the Government, it contained new substantive information never before in the Government's possession as to motivation, state of mind and intent underlying the alleged fraud on the Government.

The Relator submits that the District Court's summary dismissal of the Relator's action and this Court's affirmation thereof were clearly erroneous since the Government did not yet even possess the document in question, much less had it "thoroughly developed all the facts" revealed by the Kurrus Memorandum at the time Relator filed suit.

Unfortunately, Relator has had no discovery in this action and has had no opportunity to cross-examine the Government on what information it really had and what investigations were already occurring on September 30, 1976.

Particularly, in the circumstances of this action, where if this action is not permitted to proceed an alleged major fraud, well documented and pleaded with specificity, will be permitted to continue, a hearing should have been had in the interest of justice and in the interest of the American taxpayer. At the very least this Honorable Court sitting in banc should remand for findings of fact after an appropriate hearing on the jurisdictional issues.

POINT II

RELATOR IS A BONA FIDE INFORMER WHO HAS RENDERED A VALUABLE SERVICE. HER CONDUCT AND THIS ACTION ARE OF THE VERY TYPE THAT CONGRESS INTENDED TO ENCOURAGE IN ENACTING THE 1943 AMENDMENTS TO THE FALSE CLAIMS ACT.

The 1943 amendments to the False Claims Act were intended "to protect and compensate genuine informers who comply with the provisions respecting notice to the Attorney General" (S. Rep. No. 291, June 8, 1943, U.S. Code Congressional Service 2.324-6 (1943)). Congress made it clear that it intended to encourage a private citizen to bring and prosecute such a suit and that such a person as relator was not to be considered a troublemaker.

The False Claims Act expressly permits a taxpayer at his or her expense to file an action for fraud (31 USC §232(B)); to carry on such suit "if the United States shall fail, or decline..." to do so; or "if the United States fails to carry on such suit with due diligence..." (31 USC §232 (C)). Nor must the Relator's information be "based upon information, evidence and sources original" with the taxpayer. See Relator's March 31st Brief, pages 42 to 46.

As finally enacted, jurisdiction fails if "it shall be made to appear that such suit was based upon evidence or information in the possession of the United States." The Conference Committee had deleted from the Senate's version the following italicized language:

based upon information, evidence *and sources original*
with such person.

Thus, as discussed in Relator's Main Brief, the initial Senate's version of the amendments would have required the information to be "original" with a relator. But this requirement was deleted. Congress was more concerned about frauds which would go unprosecuted by the Government and did not want to place too great an obstacle to a suit by a taxpayer, par-

ticularly when such suit would be prosecuted at the taxpayer's expense and not the Government's. 89 Cong. Record 7570 to 7616 *passim*.

Relator, through her counsel, acquired, compiled and organized information and evidence of an alleged fraud perpetrated upon the United States, strongly suggesting the complicity of certain Government officials. Concededly, a portion of the same information compiled by Relator and her counsel now appears to have been scattered among various agencies of the Government; but at the time this action was filed, that information had not been organized and compiled by either the legislative or executive branch of the Government, or any agency thereof and obviously was not comprehended. In addition, Relator furnished the Kurrus Memorandum which is an essential link in the chain of facts underlying the alleged frauds.* It is clear therefore that the Relator was not simply urging the Government to take action upon information already in its possession but rather brought to light new and essential information of a scheme and conspiracy to defraud the Government of the United States.

Lastly, this action has been a catalyst in bringing the very issues to confrontation. One may only speculate as to how

*Relator also furnished three additional documents never before in the possession of the Government. See her Main Brief and the footnote at pages 32-33 thereof. Further, the Kurrus Memorandum would be admissible into evidence as an admission. Federal Rules of Evidence, Rule 801(d)(2). The New York Times articles would not be. Nor, under the circumstances of this case, would the attorney-client privilege presumably be a bar.

slowly the wheels of Government would have turned, if at all, had the suit not been filed on September 30th, and had Relator not furnished the ten documents or sets thereof listed on Schedule A to the complaint. The filing of the action was also intended to insure that the facts of the alleged fraud would have a judicial airing.

In interpreting the False Claims Act, the Courts have consistently held that before a suit will be dismissed, it must be established that the government has *all* the information. *States ex. rel. Leslie v. Potomac Electric Co.*, 208 F.2d 39 at page 40. (D.C. Cir. 1953); *United States ex rel. McLaughlin v. American Chain & Cable Co.*, 62 F.Supp 302 at Page 303 (S.D.N.Y. 1945); *United States of America ex rel. Anthony R. Martin-Trigona v. Ford*, Civil Action No. 76-1374 (D.D.C. October 28, 1976). In the present action, it is clear that the Government did not have *all* of the essential information at the time the Relator filed her suit.

In spite of the fraudulent admissions in the Kurrus Memorandum, the Government has chosen not to prosecute the present action and before it is ultimately dismissed, any doubt should be resolved against the Government and in favor of the taxpayers.* If the Government is permitted to have its way, the complex factual allegations set forth in the Relator's complaint will never be scrutinized by the judiciary in an objective

*Indeed, Mr. Kulukundis, who allegedly caused certain applicants to file fraudulent applications for C.D.S. Financing and Title XI Financing (See Relator's Original Complaint ¶¶ 24, 25, 27, 29) has recently been found to be a "fraud doer unworthy of belief." *Compania Naviera Asia S.A. v. Burmah Oil Co.*, Civ. Action #74-2024 (S.D.N.Y. April 27, 1977) [Findings of Fact #135, 136, 137.]

setting nor will their legality ultimately be determined. In amending the False Claims Act, Congress clearly did not intend to deny access to the Courts** but rather realized that granting private citizens the right to sue to recover government monies paid out as a result of fraudulent claims would be an important check on bureaucratic abuses — in certain carefully restricted circumstances — and a valuable adjunct to government prosecutorial activity. Compare *J. I. Case Co. v. Borak*, 377 US 426, 434, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Grace v. Ludwig*, 484 F.2d 1262, 1267 (2d Cir. 1973), *cert. denied* 416 US 905 (1974).

CONCLUSION

Despite the overwhelming evidence of the existence of a scheme and conspiracy to defraud the Government of the United States, the Government has chosen to frustrate the Relator's attempt to secure a judicial airing of the alleged fraud, for reasons undisclosed, and has shockingly concluded that there was no fraud.

The summary dismissal of the Relator's action is clearly not in the best interest of the American taxpayer and does indeed frustrate Congress' intent, as made manifest in the False Claims Act, to allow private citizens to bring to light and prosecute on behalf of the United States those individuals who are perpetrating frauds against the Government.

The Relator, as a citizen of the United States and as a taxpayer, is entitled to her day in Court.

**Indeed, Congress intended that the Federal Courts supervise the manner in which the Government conducts itself under the False Claims Act. 31 U.S.C. §§ 232(C), 233.

If this case is not reversed, it will stand as precedent for U. S. financing of foreign-owned tankers, in direct violation of the Shipping Act of 1916, through the organization of U. S. dummy corporations.

The Judgment of this Court as well as the Judgment of the District Court below should therefore be vacated and the Order of Dismissal reversed.

Dated: New York, New York

May 25, 1977

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